

Peter Benard: Permit #L-25260-L3-A-N & #L-25260-TC-B-N
// Mckearney Village Sub-division

- Draft Proposed Board Order (DEP recommendation)



STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

BOARD ORDER

IN THE MATTER OF

PETER BENARD, APPLICANT
MARY DOWD, APPELLANT
Yarmouth, Cumberland County
MCKEARNEY VILLAGE
L-25260-L3-C-Z
L-25260-TC-D-Z
Appeal of Dismissal Denied

) SITE LOCATION OF DEVELOPMENT ACT
) NATURAL RESOURCES PROTECTION ACT
) WATER QUALITY CERTIFICATION
) APPEAL OF CHAIR'S DISMISSAL
) FINDINGS OF FACT AND ORDER

Pursuant to the provisions of 38 M.R.S.A. Sections 344 and 341-D (4) and Chapter 2, Section 24 (B) of the Department of Environmental Protection's regulations, the Board of Environmental Protection has considered the appeal of MARY DOWD (appellant), its supportive documentation, the response of the applicant, documentation submitted by the applicant, and other related materials on file and FINDS THE FOLLOWING FACTS:

1. PROCEDURAL HISTORY:

On February 14, 2011, Peter Benard filed a Site Location of Development Act (Site Law) and a Natural Resources Protection Act (NRPA) application for a permit to construct a 38-lot residential subdivision, known as McKearney Village and located on a 58.2-acre parcel of land on Hillside Street in the Town of Yarmouth. The applicant also requested Department approval for the alteration of approximately 10,150 square feet of forested, freshwater wetlands for road crossings. The project includes the preservation of 32 acres of the parcel as open space. The Department approved the application in Orders #L-25260-L3-A-N and #L-25260-TC-B-N, dated July 1, 2011.

On July 29, 2011, MARY DOWD filed an appeal of the Department's decision to the Board of Environmental Protection (Board).

On August 12, 2011, the Chair of the Board dismissed her appeal, stating that the appellant did not submit evidence that would establish that she is an aggrieved person, a requirement in order to bring an appeal in this matter.

On September 8, 2011, MARY DOWD filed an appeal to the full Board of the Chair's decision to dismiss her appeal.

2. REGULATORY FRAMEWORK AND DISCUSSION:

The Department's Rules Concerning the Processing of Applications and Other Administrative Matters, Chapter 2, § 24 (B)(1), provide that "an aggrieved person may appeal to the Board for review" a decision of the Commissioner. As set forth in § 24(B)(2), the written notice of the appeal must include evidence demonstrating that the appellant is an aggrieved person. Chapter 2 § 1(B) of the Department's rules defines aggrieved person as "any person whom the Board determines may suffer particularized injury as a result of a licensing or other decision." During the review process, the appellant, Ms. Dowd, did not contact the Department to discuss concerns regarding the proposed development.

In her appeal documents of the Chair's ruling on standing, Ms. Dowd argued that she is an "aggrieved person" and may, therefore, appeal the Site Law and NRPA permits issued to Peter Benard for McKearney Village. The appellant states that she anticipates major drainage problems on her property and water in her basement as a result of the proposed development. The appellant's appeal documents also assert that she is aggrieved by the large scale pollution of a nearby river (the Royal River) and bay, and further states that the mouth of the Royal River is currently the most polluted part of Casco Bay and runoff from driveways, parking areas, lawn chemicals, and an apartment complex at the development will discharge to the Royal River.

The surrounding development primarily consists of residential structures and roadways. The appellant's property does not directly abut the project site and is located across Hillside Street, east of the project site. According to calculations made by DEP staff using Google Earth, the southwestern corner of the appellant's property is located approximately 1,200 feet, straight-line distance, from the southeastern boundary of the project site. Using the same measuring technique, the appellant's residential structure is approximately an additional 200 feet from the southeastern corner of the development. Further, evidence in the record shows the project site is divided into two watersheds: the Royal River and the East Branch of the Piscataqua River. The portion of the project that is located within the Royal River watershed drains to the northeast. Ms. Dowd's residence which is also located within the Royal River watershed based upon the topographic watershed map submitted with the application, is located easterly from the project site. The stormwater management report submitted with the application shows that the post-development peak flow rate from the site will not exceed the pre-development peak flow rate from the site and that the post-development flow path does not flow towards Ms. Dowd's property.

Regarding the appellant's contention that she is aggrieved because of the pollution of the Royal River, Ms. Dowd states that reports show the Royal River is currently the most polluted part of Casco Bay. The existing pollution of the river is not the result of the approved development and it would therefore only be relevant to this appeal to the extent that there may be cumulative effects. However, the appellant has not made any showing of how the river will be further polluted by the development other than the general statement that runoff from the development will flow to a tributary to the Royal River. In addition, the appellant does not specifically state how she will suffer particularized injury as a result of the pollution.

The Board finds that the appellant has not explained how she is an aggrieved person and has not demonstrated particularized injury as required in Chapter 2 Section 24(B)(2). Therefore, the Board finds that the appellant is not an aggrieved person as defined in Chapter 2 § 1(B) and the appellant may not bring this appeal before the Board.

Based on the above findings, the Board concludes that:

1. The appellant filed a timely appeal.
2. The appellant did not submit evidence sufficient for the Board to conclude that she is an aggrieved person for the purposes of bringing this appeal of Department Orders #L-25260-L3-A-N and #L-25260-TC-B-N.

THEREFORE, the Board UPHOLDS the Board Chair's DISMISSAL of the appeal of MARY DOWD.

DONE AND DATED AT AUGUSTA, MAINE, THIS _____ DAY OF _____, 2011.

BOARD OF ENVIRONMENTAL PROTECTION

By: _____
Susan Lessard, Chair